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No. 98-1461

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CONSTRUCTIVIST FOUNDATION, INC.,
F/K/A/ LEE FOUNDATION, INC.,

Petitioner,

v.

DEKALB COUNTY
BOARD OF TAX ASSESSORS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF GEORGIA

REPLY BRIEF OF PETITIONER

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Page

TABLE OF CONTENTS

ARGUMENT

A. THE GEORGIA TAX EXEMPTION LAW IS NEUTRAL ON ITS FACE, BUT DEKALB COUNTY'S APPLICATION OF THAT LAW TO THE FOUNDATION VIOLATES THE FOUNDATION'S CONSTITUTIONAL RIGHTS.....2

B. THE SUPERIOR COURT OF DEKALB COUNTY DID NOT CORRECTLY FOLLOW GEORGIA'S TAX EXEMPTION LAW AS THE LAW RATIONALLY RELATES TO LEGITIMATE GOVERNMENT PURPOSES.....4

TABLE OF CONTENTS, continued

C. RESPONDENTS' APPENDIX MATERIAL IS IRRELEVANT.....5

D. AN APPELLATE REVIEW PROCESS IN WHICH DECISIONS ARE NOT REPORTED AND THEY ARE NOT PRECEDENTIAL, DENIES DUE PROCESS AND EQUAL PROTECTION TO LITIGANTS.....6

E. THE STATE OF GEORGIA DOES NOT HAVE A CONSISTENTLY APPLIED TAX SYSTEM.....7

CONCLUSION 8

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ARGUMENT

A. THE GEORGIA EXEMPTION LAW IS NEUTRAL ON ITS FACE, BUT DEKALB COUNTY'S APPLICATION OF THAT LAW TO THE FOUNDATION VIOLATES THE FOUNDATION'S CONSTITUTIONAL RIGHTS.

The proposition on page 7 of Respondents' Brief that "it is also proper to tax property *owned* by a church...." [italics added] is irrelevant in this case. Of course the state can tax apartments and other non-exempt property owned by a church. However, this case involves ad valorem taxation of property *used* for religious worship, which use makes the property tax exempt regardless of the ownership. The Respondents did not provide a single reported case that explicitly holds that the user must be the owner of a place of religious worship in order for the property to be tax exempt. In this case, the churches do not own the subject property. They use the property full-time as a place of religious worship, and the applicable Georgia statute exempts *all* places of religious worship [italics added].

On page 12 Respondents cite *United States v. Lee*, 455 U.S. 252, 2863, n.3, 102 S.Ct. 1051, 1058, n. 3, 71 L. Ed. 2d 127 (1982), a social security tax case, for the proposition that "because the broad public interest in maintaining its sound tax system is of such high order, religious beliefs that conflict with the payment of taxes for it is no basis for resisting the tax." *Lee* is irrelevant. It is not a violation of the beliefs of the churches that use the Foundation's property when the DeKalb County Georgia taxing authorities refuse to grant the Foundation an exemption from ad valorem taxation of the subject property as a place of religious worship or as an institution of purely public charity. The Foundation has never made that assertion. It is a violation of the Foundation's constitutional rights under the 14th Amendment for DeKalb County not to grant the Foundation an exemption for its property when the statute provides an exemption from ad valorem taxation for *all* places of religious worship [italics added]. Neither the statute nor case law says that the user must be the owner in order for property to qualify for tax exemption as a place of religious worship. "The words *due process of law* were intended to secure the individual from the arbitrary exercise of the powers of government..." *Twining v. New Jersey*, 211 U.S. 75, 29 Sup. Ct. 14, 53 L. Ed. 97 (1908).

B. THE SUPERIOR COURT OF DEKALB COUNTY DID NOT CORRECTLY FOLLOW GEORGIA'S TAX EXEMPTION LAW AS IT RATIONALLY RELATES TO LEGITIMATE GOVERNMENT PURPOSES.

Respondents state on page 10, "A government could reasonably conclude that it would not exempt landowners who lease property to others for religious purposes." This is exactly what the Georgia tax exemption law provides in O.C.G.A. 48-5-41(d), as cited by Petitioner on page 13a in Appendix E of its Petition. However, Judge Flake did not follow that code section in denying the exemption in this case. In order to follow that code section, she would have had to find that the Foundation had "... the primary purpose of securing an income ..." from its property. She did not make that finding of fact. Rather, she refused to allow the Foundation to introduce evidence of the primary purpose of the property, which evidence the Foundation had proffered for appeal purposes. Instead, Judge Flake determined that the user had to be the owner, which is not Georgia law and which decision is not rationally related to a legitimate government purpose.

C. RESPONDENTS' APPENDIX MATERIAL IS IRRELEVANT.

Respondents include Appendix "A," "the most recent Order of the Superior Court in a related case," to try to demonstrate that "Petitioner is not entitled to the relief sought." But the decision in Respondents' Appendix "A" is irrelevant to the issues upon which the Foundation seeks relief in the instant case before this Court. Note that the same DeKalb County Superior Court Judge was involved in the instant case and the case in Respondents' Appendix "A." In both cases Judge Flake has misused cases in the same manner to say that the user must be the owner for property to be exempt from ad valorem taxation as a place of religious worship. The length to which Judge Flake will go to deny the Foundation the tax relief due to the Foundation on its church property, which is undeniably used as a place of religious worship, is shown on page 28 of the Respondent's Appendix "A." There Judge Flake finds that the Foundation lacks standing to claim refunds because the mortgagee paid the taxes

for the Foundation and then charged the Foundation for such payments. Thus, according to Judge Flake, the Foundation was not the "taxpayer" and did not have standing to claim a refund!

Likewise, Respondents' only other Appendix item, Appendix "B," a previous Order consolidating and staying some related actions in DeKalb County Superior Court, is irrelevant at this time, in this Court.

D. AN APPELLATE REVIEW PROCESS IN WHICH DECISIONS ARE NOT REPORTED AND ARE NOT PRECEDENTIAL DENIES DUE PROCESS AND EQUAL PROTECTION TO LITIGANTS.

Respondents, on page 17, conclude that " ... Georgia infringed no constitutional right when the Court of Appeals did not issue a written opinion." The infringement does not occur merely by the court not issuing a written opinion The infringement occurs when the court not only fails to report a decision, but also determines the decision not to be precedential. Thus, the Court of Appeals is not bound by *stare decisis* and can make opposite decisions in cases with

identical facts! Such a capricious judicial process does not meet the minimum standards necessary for constitutional substantive and procedural due process and for equal protection since the identical facts can result in opposite decisions. Due Process has long been associated with the right to be immune "from arbitrary power not acting by general laws." *Twining v. New Jersey*, 211 U.S. 75, 29 Sup. Ct. 14, 53 L. Ed. 97 (1908).

E THE STATE OF GEORGIA DOES NOT HAVE A CONSISTENTLY APPLIED TAX SYSTEM.

On page 13 Respondents imply that Georgia has a consistently applied tax system. However, that is clearly not true. As Petitioner has shown above, the State of Georgia clearly can not have a consistently applied tax system because in the appellate review process decisions can be subject to the abuse of arbitrary decision making, when *stare decisis* is not followed.

CONCLUSION

For the foregoing reasons, and those given in the petition, the Petitioner respectfully requests that its Petition for Certiorari be granted.

Respectfully submitted,

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